IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERIE INSURANCE PROPERTY &
CASUALTY COMPANY, INC.

Plaintiff,

vs. **Civil Action No. 09-CV-00113**

CRAIG A. EDMOND, JANET EDMOND,
DREAMLAND DEVELOPMENT, LLC,
d/b/a PLEASANT DAY SCHOOLS,
LATASHA HENRY,
DONNA CALANDRELLA,
CRYSTAL SMITH,
and CHRISTINA HATCHER MCGERVEY,

Defendants.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY

COME NOW, Defendants, Latasha Henry, Donna Calandrella, Crystal Smith, and Christina Hatcher McGervey, by counsel, Jackson Kelly PLLC, and respectfully request that, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, 28 U.S.C. §§ 2201-02, and the factors discussed in Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 377 (4th Cir. 1994), this Court dismiss the Complaint for Declaratory Judgment Relief filed by Erie Insurance Property and Casualty Company, Inc. Based upon the discretion that the Court may exercise under the Declaratory Judgment Act, 28 U.S.C. § 2201, and binding Fourth Circuit authority, the Court should dismiss this action.

In the alternative, Defendants, Latasha Henry, Donna Calandrella, Crystal Smith, and Christina Hatcher McGervey, move this Court for an order staying this action pending the resolution of the underlying state court action in the Circuit Court of Monongalia County.

Contemporaneously with this motion, Defendants, Latasha Henry, Donna Calandrella, Crystal Smith, and Christina Hatcher McGervey, file a memorandum of law in support, which explains the reasons why Defendants are entitled to relief.

/s/ Julia Chico Abbitt
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Defendants.

CERTIFICATE OF SERVICE

I, Kevin J. Cimino, counsel for Defendants, certify that service of "MOTION TO DISMISS, OR IN THE ALTERNATIVE STAY, ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY" has been served upon the following parties via ECF and/or U.S. Mail, as appropriate, on this the 13th day November, 2009 as follows:

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Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY

COME NOW, Defendants Latasha Henry, Donna Calandrella, Crystal Smith, and Christina Hatcher McGervey ("Underlying Plaintiffs") by counsel and submit the following memorandum of law in support of their motion to dismiss, or in the alternative, motion to stay.

The Court should dismiss the complaint for declaratory judgment filed by Erie Insurance Property & Casualty Company, Inc. ("Erie") in favor of the underlying state court action because an application of the factors discussed in Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 377 (4th Cir. 1994) weigh in favor of relinquishing the Court's jurisdiction to the Circuit Court of Monongalia County, West Virginia. Alternatively, the Court should stay this action until the underlying state court action is resolved. See Erie Ins. Prop. & Cas. Co. v. Shrewsbury, 1:07-cv-00706 (S.D. W. Va. Aug. 6, 2008) (Faber, J.) (attached as "Exhibit A").

I. BACKGROUND

The Underlying Plaintiffs, Donna Calandrella, Latasha Henry, Crystal Smith, and Christina Hatcher McGervey, all former employees of Dreamland Development, LLC, d/b/a Pleasant Day Schools ("Pleasant Day"), were sexually harassed and sexually assaulted by Defendant Craig Edmonds, as the owner and operator of Pleasant Day, a day care center located in Morgantown, West Virginia. Mrs. Edmond, in her supervisory capacity over these employees, was made aware of the problems and did nothing to address them. In response to their opposition to this unlawful conduct, Pleasant Day terminated Ms. Calandrella's and Ms. Henry's employment. In Ms. Calandrella's case, the termination was in violation of a written employment agreement. Ms. Smith and Ms. McGervey were constructively discharged from their employment.

By way of background, the Edmonds purchased Pleasant Day in April 2007. (Original Compl. at ¶10; Doc. 3-1 at 2.) Under the former owners and prior to the Edmonds' purchase of Pleasant Day, Ms. Calandrella held the position of Director at the day care center and, at the request of the Edmonds, signed a contract of employment for a two (2) year term which commenced on March 31, 2007 and was to terminate on March 31, 2009. (Id. ¶82; Doc. 3-1 at 14.) Immediately upon taking over ownership of Pleasant Day, Mr. Edmond subjected the Underlying Plaintiffs to inappropriate sexual comments, inappropriate sexual touching, and other offensive sexual conduct on a regular basis. (Id. ¶11; Doc. 3-1 at 2.) He made unwelcome sexual advances toward the Underlying Plaintiffs and other employees, made requests for sexual favors, and exhibited other conduct of a sexual nature toward them. (Id. ¶17; Doc. 3-1 at 3.) Mr. Edmond sometimes used the children at the day care center to camouflage his egregious behavior. (Id. ¶11; Doc. 3-1 at 2.) He subjected the Underlying Plaintiffs to harmful and offensive contact and touching that was both sexual and physically threatening and caused Plaintiffs to be in imminent apprehension of harmful contact, which was not consensual. (Id. ¶¶ 42, 58, 59, 65, 70; Doc. 3-1 at 7-11.)

Importantly, one of the allegations against Mr. Edmond is that on at least one occasion and during the course of his employment at Pleasant Day, he "used words, actions and conduct including his physical strength, to overpower, illegally detain, and restrain Plaintiffs against their will, and/or caused Plaintiffs to be in reasonably apprehension of such restraint and detention and, thus, subjected Plaintiffs to false imprisonment." (Id. ¶ 71; Doc. 3-1 at 12.) There is no allegation that the sole purpose of Mr. Edmond's false imprisonment was intended to humiliate or harass the Underlying Plaintiffs.

The Underlying Plaintiffs complained about the conduct to Mr. Edmond directly, to Mrs. Edmond, in her supervisory capacity, and also to the then assistant director of Pleasant Day. (Id. ¶20, 23, 24, 26; Doc. 3-1 at 4.) However, Pleasant Day had no formal employee handbook, manual, grievance procedure, or antiharassment or antidiscrimination policy in place. (Id. ¶ 22; Doc. 3-1 at 4.) Because of their complaints, Mr. Edmond began threatening the employees and no remedial action was taken by anyone. (Id. ¶12, ¶23; Doc. 3-1 at 3, 4.) Ms. Calandrella was terminated in retaliation for opposing the illegal conduct in violation of her employment agreement; Ms. Henry was likewise fired in retaliation for opposing the illegal conduct; and Ms. McGervey and Ms. Smith were constructively discharged due to the hostile work environment. (Id. ¶¶ 20, 29, 81, 82; Doc. 3-1 at 4, 5, 13-14.)

On August 1, 2008, the Underlying Plaintiffs filed suit in the Circuit Court of Monongalia County, West Virginia alleging claims for Hostile Environment Sexual Harassment, Retaliatory Discharge, Wrongful Discharge in Violation of Public Policy, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Assault, Battery, False Imprisonment, Invasion of Privacy, Breach of Contract, and Violation of the Wage Payment and Collection Act. Thereafter, on August 18, 2009, they filed a motion to amend their complaint, which was granted that same day. The Underlying Plaintiffs' First Amended Complaint included a claim against Mrs. Edmond alleging that she aided and abetted Pleasant Day to engage in unlawful discriminatory practices in violation of West Virginia Human Rights Act §5-11-9(7)(A). (First Amended Compl. ¶ 99.) (Attached as "Exhibit B").

Almost exactly one year after the Underlying Plaintiffs filed their action in state court, on July 31, 2009, Pleasant Day's insurer, Erie Insurance Property & Casualty Company, Inc. ("Erie"), filed this declaratory judgment action. (Doc. 3.) In its complaint, Erie seeks a determination that the Ultraflex Package Policy #Q39-8050037W issued to Pleasant Day Schools "does not provide any benefits, coverage or duty to defend or indemnify for Underlying Defendants against the claims asserted by the Underlying Plaintiffs in the state court action.[1] (Id. at ¶ 3.)

In support of its allegations, Erie claims that coverage should be denied because (1) the Employment Related Practices Exclusion excludes coverage for all of the Underlying Plaintiffs' claims, including the claim for false imprisonment; (2) there is no allegation of bodily injury or property damage; (3) there is no allegation of "an occurrence"; (4) there is no coverage for bodily injuries which were expected or intended; (5) coverage is not triggered by the allegations for personal injury as all allegations are denied excluded by the Employment Related Practices exclusion; (6) the benefits liability coverage does not apply; and (7) punitive or exemplary damages are excluded from coverage for any liability covered under the Limited Employers Liability Coverage. (Id. at ¶¶ 10-76.)

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[1] Although Erie cited the relevant portions of the policy in its complaint, the entire policy is attached as "Exhibit C."

Because the state court action was filed more than a year ago, a substantial amount of discovery has taken place. For instance, as of the filing of this motion, the depositions of Mr. Edmond, Mrs. Edmond, and Ronda Teets[2] have been taken and the Underlying Plaintiffs' depositions will be taken in the near future. A site inspection of the facility has taken place as well. Additionally, the Underlying Plaintiffs have served the Underlying Defendants with four sets of interrogatories and four sets of requests for production of documents. The Underlying Defendants have served two sets of interrogatories requests for production of documents to each of the Underlying Plaintiffs. In total, approximately 2,500 documents have been exchanged and produced. As a result of the evidence obtained through discovery, on November 12, 2009, the Underlying Plaintiffs filed another motion to amend their complaint to add a claim for Negligent Supervision/Retention and a claim to pierce Pleasant Day's corporate veil and hold other corporate entities liable for its acts. (Attached as "Exhibit D.")

This second amended complaint also includes a claim for declaratory judgment against Erie because prior to Erie filing this declaratory judgment action, the Underlying Plaintiffs received discovery that indicated that Pleasant Day's insurer covered some of the claims raised in both the Original and First Amended Complaint. Specifically, an e-mail dated Friday, September 5, 2008, from Don Grossman at Quadrant Financial to Pleasant Day's counsel in the state court action. (Attached as "Exhibit E.") This e-mail memorializes a conversation regarding the lawsuit and whether there was coverage for the Underlying Plaintiffs' claims. With respect to the "[r]esponsibility for payment between the Insurance Company and the business[,]" Mr. Grossman stated, "You [the Underlying Defendants' counsel] had indicated you thought settlement of the SH charges should be [the] Insurance Co and[]it is likely the Ins Co would argue[]the Contractual issue would be the Daycare, but that the damages would be limited to the difference between her original pay and what she earned after leaving the daycare." Id.

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[2] During the relevant time period, Ms. Teets was the "Administrator" of Pleasant Day.

Accordingly, given that information, which was produced or occurred during the course of discovery, the Underlying Plaintiffs had no reason to question the coverage issue. However, since Erie recently asserted that it no longer has a duty to defend and indemnify the Edmonds and Pleasant Day, the Underlying Plaintiffs have requested that the circuit court add Erie as defendant and determine whether Erie must provide coverage and/or a duty to defend or indemnify the Underlying Defendants against the claims asserted in the state court action.

Since all the issues between the parties in this action are now before the Circuit Court of Monongalia County, West Virginia, this Court should exercise its discretion to dismiss this case in favor of the underlying state court action.

II. ARGUMENT

Pursuant to the Declaratory Judgment Act, a district court, "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). "[T]he Declaratory Judgment Act [i]s an enabling Act, which *confers a discretion on the courts rather than an absolute right upon the litigant*." Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (emphasis added). In considering whether to hear a case under the Act, a court must initially consider whether the declaratory judgment action will (1) "serve a useful purpose in clarifying and settling the legal relations in issue[;]" and (2) "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Centennial Life Ins. Co. v. Poston, 88 F.3d 255, 256 (4th Cir.1996) (citations omitted).

If these factors are met, then the district court must also analyze the four-factor abstention test set forth in Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 377 (4th Cir.1994). Under the Nautilus test, a district court must consider: (1) "the strength of the state's interest in having the issues raised in the federal declaratory action decided in state court[;]" (2) whether the issues raised in the federal action can be more efficiently resolved in the pending state action; (3) whether the federal action "would result in unnecessary entanglement between the federal and state systems[;]" and (4) "whether the federal action is being used merely as a device for procedural fencing,--that is, to provide another forum in a race for *res judicata* or to achieve a federal hearing in a case otherwise not removable." Id. (citations and internal quotation marks omitted).

Importantly, a declaratory judgment action "should not be used 'to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted.'" Poston, 88 F.3d at 256-57 (quoting Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937)). Moreover, in making its determination the Court must consider the principles of federalism, efficiency and comity. Mitcheson v. Harris, 955 F.2d 235, 239-41 (4th Cir. 1992) (holding that a district court should have abstained from hearing a case because of the presence of a parallel state court proceeding and stating that "[a]bsent a strong countervailing federal interest, the federal court here should not elbow its way into this controversy to render what may be an 'uncertain and ephemeral' interpretation of state law[]"); see also Am. Motorists Ins. Co. v. Commonwealth Med. Liab. Ins. Co., 306 F. Supp. 2d 576, 579 (E.D. Va. 2004) (noting that the Fourth Circuit has a long history of reluctance when it comes to exercising jurisdiction over declaratory judgment actions involving the indemnification of parties to state court actions).

In this case, although the initial considerations discussed in Poston are likely met, i.e., whether the action will serve a useful purpose in clarifying and settling the legal relations in issue and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, those considerations can be addressed in the state court action. More importantly, however, an analysis of the Nautilus elements establishes that three of the four factors weigh heavily against Erie with one factor being neutral. Therefore, the Court should dismiss its request for a declaratory judgment.

A. The Nautilus Factors Weigh in Favor of Dismissal.

1. West Virginia has a significant interest in having the insurance policy construed in the state court action because the provision Erie relies upon in denying coverage, namely the Employment Related Practices Exclusion, has only been mentioned in passing by one West Virginia Supreme Court of Appeals' case and has not been discussed in any detail, especially with respect to a false imprisonment claim by an employee.

The first *Nautilus* factor, West Virginia's interest in having the issues raised in the declaratory judgment action decided in state court, weighs heavily in favor of dismissal.

"Because the issues that will determine the outcome [of this case] are governed by substantive West Virginia law, West Virginia has an interest in having the issues decided in state court." Cont'l Cas. Co. v. Fuscardo, 35 F.3d 963, 967 (4th Cir. 1994). Although application of state law alone is not a justification for declining to exercise federal jurisdiction in a declaratory judgment action, Nautilus, 15 F.3d at 378, a state's interest favors abstention when the case presents an issue of state law that is particularly close, difficult, unsettled, complex, or otherwise problematic. Id.; First Fin. Ins. Co. v. Crossroads Lounge, Inc., 140 F. Supp. 2d 686, 695 (S.D. W. Va. 2001) (Chambers, J.). Importantly, "the state's interest is stronger in questions of insurance law." Id. at 694.

Thus, initially it should be noted that since this case involves insurance law, the state's interest is stronger than in any other instance. Id. Even more persuasive, however, is the fact that the questions raised by Erie's declaratory judgment action involve particularly close, unsettled, and problematic issues of insurance policy interpretation under West Virginia law. Specifically, the coverage issue is likely to turn heavily on the application of the "Employment Related Practices Exclusion" and there is virtually no law decided by the West Virginia Supreme Court of Appeals that explains the application of this exclusion, particularly with respect to allegations of false imprisonment. Thus, as this Court has noted, "the tribunal which passes on this question will be reviewing an issue of first impression in the State of West Virginia." State Farm Fire & Cas. Co. v. Kirby, 919 F. Supp. 939, 943 (N.D. W. Va. 1996) (Keeley, J.).

In its complaint, Erie relies heavily on the Employment Related Practices Exclusion to allege that the allegations in the underlying state court action are not covered by the policy. This exclusion provides that "[t]his insurance does not apply to: 'bodily injury [and 'personal and advertising injury'] a. A person arising out of any: 1) Refusal to employ that person; 2) Termination of that person's employment; or 3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person[.]" (Exhibit C at 000109; see also 000091, 000096.) (Employment-Related Practices Exclusion, UF-9680 (ed. 7/98)

However, under Coverage B – Personal and Advertising Injury Liability, the policy also provides that Erie "will pay those sums that [it] becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies."[3] (Exhibit C at

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[3] There is also a provision that states Erie "will pay those sums that [it] becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of 'personal and advertising injury' to which this insurance applies." (Exhibit C at 000089.) (Coverage for Punitive Damages, UF-9450, p.1.)

000094.) (Commercial General Liability Coverage Form, UF-9708, p. 4.) The policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses . . . [f]alse arrest, detention or imprisonment[.]" (Id. at 000101.) (Commercial General Liability Coverage Form, UF-9708, p.11.) This coverage is not limited in anyway to non-employees. In other words, no where in the insurance policy does it say that coverage for false imprisonment claims are excluded for employees of the insured. Thus, by the plain language of the policy, Erie is obligated to defend and indemnify, at the very least, the Underlying Plaintiffs' claims for false imprisonment. (Original Compl. at ¶¶ 71-75; Doc. 3-1 at 12.)

Erie's complaint alleges that coverage for the false imprisonment claims is excluded under the Employment Related Practices Exclusion. (Doc. 3 at 6.) If that were true, then the provision providing coverage for false imprisonment claims is essentially given no effect as applied to the insured's employees. Indeed, in Acuity v. N. Cent. Video, LLP, No. 1:05-cv-010, 2007 WL 1356919 (D.N.D. May 7, 2007), the district court engaged in a thorough analysis of this exact issue. As the court explained, to interpret the Employment Related Practices Exclusion as excluding an employee's claim for false imprisonment does not give effect to the coverage provision because "[i]t would be simple enough to provide that 'all claims brought by employees are excluded,' if that was the intent of the drafters." Id. at *14. Here, Erie utilizes the provision in its complaint as though it excludes every cause of action alleged by the Underlying Plaintiffs because they were Pleasant Day employees. This is not a reasonable reading of the exclusion. "If every injury arising out of an act that somehow related to an employee were to be excluded, the exclusion would effectively swallow the coverage." Id.

The Employment Related Practices Exclusion has only been mentioned in one West Virginia Supreme Court of Appeals' case. In Bowyer v. Hi-Lad, Inc., 609 S.E.2d 895, 913 (W. Va. 2004),[4] the court simply stated:

> The second exclusion asserted by Westfield excludes coverage for liability "arising out of any ... [e]mployment-related practices, policies, acts or omissions, such as coercion, ... harassment, humiliation or discrimination directed at that person[.]" We find nothing in the record to suggest that appellant Hi-Lad, Inc. made it a practice, or had a policy, or engaged in, acts of humiliation. In other words, while Mr. Bowyer contends he suffered humiliation as a result of the appellant's actions, there is nothing to indicate that the appellant's actions were intended to cause humiliation. Accordingly, we also find no operative fact to support this exclusion.

Thus, there is no guidance from the West Virginia Supreme Court of Appeals as to how a court should construe this ambiguity and therefore West Virginia has a significant interest in having the insurance policy construed in the state court action.

Recently, in an unpublished case from the United States Court of Appeals for the Fourth Circuit, the court held that there is no ambiguity when the facts show that the false imprisonment was intended to humiliate or harass the employee. Cornett Mgmt. Co., LLC v. Fireman's Fund Ins. Co., No. 07-2019, 2009 WL 1755912, at *2-3 (S.D. W. Va. June 22, 2009). Importantly, this case is not binding because it is unpublished, but nonetheless it is distinguishable from the allegations Erie relies upon in this case and, more importantly, does not stand for the proposition that this issue is settled under West Virginia law.

In Cornett Mgmt. Co., LLC, the Fourth Circuit relied on the following language in Bowyer, "there is nothing to indicate that the [insured's] actions were intended to cause humiliation." Id. at *2. The court took an extremely expansive view of this sentence and determined that the West Virginia Supreme Court of Appeals meant to re-write the insurance policy at issue and hold "that the [Employer Related Practices] exclusion would apply to any claim arising from an employer's act or omission intended to result in coercion, harassment, humiliation, or discrimination." Id. The court determined that the complaint in that case "clearly alleges acts . . . that involved intentional coercion, harassment, and humiliation of . . . employees." Id.

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[4] In Bowyer, a hotel employee sued a hotel owner, alleging that the owner had subjected him and all other front desk employees to illegal oral surveillance in violation of Wiretapping and Electronic Surveillance Act. Id. at 903. The hotel owner's insurer filed a complaint seeking a declaratory judgment that there was no coverage for employee's lawsuit under a commercial general liability insurance policy. The court rejected the insurer's argument. Id.

If given the opportunity it is unlikely that the West Virginia Supreme Court of Appeals would construe Bowyer as broadly as the Fourth Circuit did in Cornett Mgmt. Co., LLC. Nevertheless, even if this Court accepts the unpublished decision, the allegations regarding the Underlying Plaintiffs' false imprisonment claims do not allege the intent of Mr. Edmond's false imprisonment. Moreover, to the extent that the intent behind the false imprisonment is important, it would require further development of the factual record and result in unnecessary "entanglement" because of the presence of "overlapping issues of fact or law." See infra II (A)(2).

Despite the Fourth Circuit's decision in Cornett Mgmt. Co., LLC, this issue has not been addressed by the West Virginia Supreme Court of Appeals and therefore presents an issue of state law that is particularly close, difficult, unsettled, complex, or otherwise problematic. Nautilus, 15 F.3d at 378. The interpretation of these two conflicting provisions should be determined by state court in this instance. These issues are not a straightforward application of settled West Virginia law. Nat'l Liability & Fire Ins. Co. v. Wheatley, Civ. Action No. 5:07-cv-00189, 2008 WL 759326, at *5 (S.D. W. Va. Mar. 19, 2008) (Johnston, J.) ("Because it is unclear how the West Virginia Supreme Court of Appeals would rule on this insurance law issue, the Court is faced with a close, problematic, and unsettled issue of state law. Accordingly, the

Court **FINDS** that West Virginia has a significant interest in the resolution of this issue. Consequently, this factor weighs heavily in favor of declining to exercise jurisdiction.").

Instead, these provisions have not been construed by the West Virginia Supreme Court of Appeals and West Virginia has a significant interest in resolving this issue in the state court action. As was the case in Kirby, "when considered in conjunction with the other Nautilus factors, the fact that there are no West Virginia cases interpreting insurance policy language analogous" to the provisions raised in this case "militates strongly in favor of dismissal of the federal action." 919 F. Supp. at 943.

2. The issue of whether the Underlying Plaintiffs' claims are covered by the insurance policy can be resolved more efficiently in the Circuit Court in Monongalia County.

Once Erie is added to the state court action, all of the rights, liabilities, and obligations of the parties involved can be adjudicated by Circuit Court of Monongalia County. In Nautilus, the court noted that this element:

> [R]equires careful inquiry into the scope of the pending state court proceedings, including such matters as whether the claims of all parties in interest to the federal proceeding can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, and whether such parties are amenable to process in that proceeding.

15 F.3d at 378-79 (internal quotation marks and brackets omitted). A federal court should not entertain a declaratory judgment action when the result would not settle the entire controversy. Mitcheson, 955 F.2d at 239; State Farm Mut. Auto. Ins. Co. v. Shingleton, Civ. Action No. 1:07-cv-29, 2007 WL 3348462, at *4 (N.D. W. Va. Nov. 8, 2007) (Keeley, J.).

As set forth above, this Court cannot decide the controversy between Erie and the defendants in this action without reference to the state court case and the development of evidence regarding the nature of the claims, specifically the Underlying Plaintiffs' claims for false imprisonment. Poston, 88 F.3d at 258 (stating that efficiency factor favored abstention when pending state action would settle the entire matter but federal declaratory judgment action would not). An important factor in declining federal jurisdiction is if "the state court action contains a defendant and a number of issues not present in the federal action." Id. at 257. This is the case here. The state court action will resolve several issues not present in this action, including the Underlying Defendants' liability and the amount of damages.

Furthermore, the fact that Erie has not yet been added to the state court action is irrelevant as it is amendable to process in the state court action and will be added as soon as the circuit court rules on Plaintiffs' motion to amend. (See Exhibit D.) Second, the mere ability to join an additional party in state court is enough for this factor to weigh in favor of dismissal. See, e.g., Wheatley, 2008 WL 759326, at *5. As Judge Faber noted in Shrewsbury, "[i]t is important to note that no coverage action need be pending in state court for the efficiency factor to weigh in favor of the federal court declining jurisdiction." Shrewsbury, 1:07-cv-00706, at *11 n.6 (citing Fireman's Ins. Co. of Washington, D.C. v. Hunter Constr. Group, Inc., No. 3:07-cv-00120, 2008 WL 2247138, at *3 (W.D.N.C. May 29, 2008) (internal citation omitted) ("In a petition for declaratory judgment, when the state and federal actions stem from the same set of operative facts, and certain factual issues are related to both the coverage action and the underlying liability action against the insured, the balance is tipped in favor of declining jurisdiction, *even though no coverage action is pending in state court.*")(emphasis added)).

Thus, because this Court must rely on facts and evidence presented in the state court action, and because the state court action can resolve all of the issues between the parties, the second Nautilus factor also weighs heavily in favor of dismissal. Id.

3. By permitting this action to go forward, unnecessary "entanglement" between the federal and state court systems will result.

Overlapping issues of fact or law will result if this Court does not dismiss Erie's declaratory judgment action. Initially, depending on the outcome of the state court action, any entanglement may be unnecessary because "a federal declaration that Erie has no duty to indemnify could be rendered totally unnecessary by a subsequent state verdict" in favor of the Underlying Defendants. See Shrewsbury, 1:07-cv-00706, at *11 n.6 (citing Indem. Ins. Co. v. Schreifer, 142 F.2d 851, 853 (4th Cir. 1944)).

Moreover, Erie's declaratory judgment arises from the same set of facts and circumstances as the Underlying Plaintiff's claims against Pleasant Day and the Edmonds. Once the Underlying Plaintiffs' complaint is amended, the insurance coverage issue will be before both courts. Given that possibility, "issue preclusion will likely frustrate the orderly progress of state court proceedings by leaving the state court with some parts of a case foreclosed from further examination but still other parts in need of full scale resolution." Mitcheson, 955 F.2d at 239; cf. Myles Lumber Co. v. CNA Financial Corp., 233 F.3d 821, 825 (4th Cir. 2000) ("We perceive no realistic threat of entanglement here primarily because there is no pending state court action.").

Even without the declaratory judgment currently pending in both courts, should the Fourth Circuit's holding in Cornett Mgmt. Co., LLC control, unnecessary entanglement is present since a determination of the coverage issue regarding the false imprisonment claims will need to be determined by Mr. Edmond's intent. This Court is not in a position to make that determination until all the facts and evidence is presented in the state court action, including a jury verdict. Should this action be retained an inquiry by this Court into Mr. Edmond's intent will result in this case being decided by "piecemeal" and this Court's decision may be different, or even bind, the state court determination with respect to this and any other factual issues that must be resolved. Poston, 88 F.3d at 256-57 (holding that a controversy should not be tried by "piecemeal").

Therefore, unnecessary entanglement is present and this factor likewise weighs heavily in favor of dismissal.

4. Whether the Declaratory Judgment Action is Being Used Merely as a Device for "Procedural Fencing."

This factor is neutral as Erie likely did not file this action as a means of procedural fencing. The purpose of the final factor is to ensure that the party filing the declaratory judgment action does not "provide another forum in a race for *res judicata*" or "to achieve a federal hearing in a case otherwise not removable." Kirby, 919 F. Supp. at 945 ("Nautilus seems to suggest that 'procedural fencing' is only evident in situations where 'a party has raced to federal court in an effort to get certain issues that are already pending before the state courts resolved first in a more favorable forum,' or in situations in which the declaratory action is filed in order to obtain a federal forum in a case that could not otherwise be removed."). Since this issue was not pending before the state court prior to Erie's declaratory judgment action, that does not appear to be the case.

Prior to Erie's declaratory judgment action, the underlying Plaintiffs had no reason to doubt the existence of coverage. Initially, Erie participated in the first mediation held by the parties prior to the state court action being initiated. Thus, at least at the outset, it appeared to the Underlying Plaintiffs that coverage existed. More importantly, however, during the course of discovery, the Underlying Defendants produced to the Underlying Plaintiffs an e-mail to the Underlying Defendants' counsel in the state court action indicating that coverage for the sexual harassment claims was not excluded. (Exhibit E.). Accordingly, given that e-mail, there was no reason to join Erie as a defendant in the state court action, until Erie filed this declaratory judgment action.[5] Thus, the final Nautilus factor is neutral. See Nautilus Ins. Co. v. Maynard, No. 2:07-cv-00105, 2007 WL 2963774, at *3 (S.D. W. Va. Oct. 9, 2007) (Faber, J.).

B. If the Court Declines to Dismiss this Case, Then the Case Should Be Stayed Pending Resolution of the Underlying State Court Action.

After an analysis of the Nautilus factors, three weigh heavily in favor of dismissal, while only one is neutral. Accordingly, the Court should dismiss Erie's claim for declaratory judgment in its entirety. Dismissal is appropriate because, as this Court held in Kirby, when "the state court action will resolve the controversy underlying the declaratory action[,]" dismissal, as opposed to a stay, is the proper course of action. 919 F. Supp. at 942 n.1. A stay, on the other hand, "will often be the preferable course, insofar as it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." Id. (quoting Wilton, 515 U.S. at 288 n.2).

Here, since resolution of the claims against the underlying Defendants will entail resolution of the coverage issue raised in Erie's declaratory judgment action, this case should be dismissed. Nevertheless, should the Court decide to retain the case to ensure all matters are addressed, the Underlying Plaintiffs would respectfully request a stay rather than denial of their motion. See Shrewsbury, 1:07-cv-00706, at *11.

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[5] Again, given the purpose of this factor, Kirby, 919 F. Supp. at 945, the motion to amend the complaint to include Erie in the state court action has no impact on the Court's analysis. See, e.g., Shrewsbury, 1:07-cv-00706, at *12 (holding that there was no procedural fencing even though the plaintiff filed a motion to amend the state court action after the initiation of the federal declaratory judgment action and focusing only on the party who brought suit in federal court).

III. CONCLUSION

For the reasons stated above, this Court should dismiss Erie's declaratory judgment action in favor of the principles of federalism, efficiency and comity. Mitcheson, 955 F.2d at 239-41.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERIE INSURANCE PROPERTY &
CASUALTY COMPANY, INC.

Plaintiff,

vs. **Civil Action No. 09-CV-00113**

CRAIG A. EDMOND, JANET EDMOND,
DREAMLAND DEVELOPMENT, LLC,
d/b/a PLEASANT DAY SCHOOLS,
LATASHA HENRY,
DONNA CALANDRELLA,
CRYSTAL SMITH,
and CHRISTINA HATCHER MCGERVEY,

Defendants.

CERTIFICATE OF SERVICE

I, Julia Chico Abbitt, counsel for Defendants, certify that service of "MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE STAY, ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY" has been served upon the following parties via ECF and/or U.S. Mail, as appropriate, on this the 13th day November, 2009 as follows:

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